



राजपत्र, हिमाचल प्रदेश

(असाधारण)

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

शिमला, शुक्रवार, 2 मार्च, 2007/11 फाल्गुन, 1928

हिमाचल प्रदेश सरकार

निर्वाचन विभाग

अधिसूचना

शिमाला-171 009, 23 फरवरी, 2007

संख्या 3-6/2005-ई० एल० एन०.—भारत निर्वाचन आयोग की अधिसूचना संख्या 82/हि० प्र०-वि० स०/ (2/2003)/2005, दिनांक 13 जनवरी, 2007 तदनुसार 23 पौष, 1928 (शक्) जिसमें 32—ऊना विधान सभा निर्वाचन क्षेत्र से विधान सभा निर्वाचन-2003 को प्रश्नगत करने सम्बन्धी सिविल अपील संख्या-809/2005 शीर्षक “श्री विरेन्द्र नाथ गौतम बनाम श्री सतपाल सिंह एवं अन्य” में माननीय उच्चतम न्यायालय, दिल्ली के तारीख 8 दिसम्बर, 2006 का निर्णय निहित है, को जनसाधारण की सूचना हेतु प्रकाशित किया जाता है।

आदेश से,

हरताक्षरित/-

(मनीषा नन्दा)

मुख्य निर्वाचन अधिकारी,
हिमाचल प्रदेश।

भारत निर्वाचन आयोग

13 जनवरी, 2007

तारीख

23 पौष, 1928 (शक)

अधिसूचना

संख्या 82/हि० प्र०/(2/2003)/2005.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 116 (सी) (2) (बी) के अनुसरण में निर्वाचन आयोग 2005 की सिविल अपील संख्या 809 में उच्चतम न्यायालय के तारीख 8-12-2006 के निर्णय को एतद्वारा प्रकाशित करता है।

आदेश से,

हस्ताक्षरित/-
(के० अजय कुमार)सचिव,
भारत निर्वाचन आयोग।

ELECTION COMMISSION OF INDIA

Nirvachan Sadan,
Ashoka Road,
New Delhi-11 0001.

13th January, 2007

Dated:

23 pause, Saka (1928)

NOTIFICATION

No. 82/HP-LA/(2-03)/2005.—In pursuance of Section 116 (C) (2) (b) of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes judgment dated 8-12-2006 of the Supreme Court of India in Civil No. 809 of 2005.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 809 OF 2005

Virender Nath Gautam

Satpal Singh & Ors.

Versus

... Appellant.

... Respondents.

JUDGMENT

C. K. THAKKER, J. :

This appeal is filed by the appellant against the judgment and order dated December 20, 2004 passed by the High Court of Himachal Pradesh, Shimla in Election Petition No. 2 of

2003. By the said order, the High Court upheld the preliminary objection raised by the first respondent that the Election Petition did not disclose material facts and was liable to be dismissed.

The case of the appellant is that the Election Commission of India notified the programme for the elections to the Legislative Assembly in the State of Himachal Pradesh scheduled to be held in February 2003. As per the said notification, the last date of filing of nomination papers was February 7, 2003, scrutiny—February 8, 2003, date of withdrawal—February 10, 2003, date of polling—February 26, 2003 and of counting of votes—March 1, 2003. According to the appellant, he submitted his nomination paper as a candidate of Indian National Congress Party on February 26, 2003 from 32—Una Assembly Constituency. Respondent No. 1 was set up by Bhartiya Janata Party and contested the election from the said constituency. At the counting, according to the appellant, he secured 27,600 votes while the first respondent got 27,651 votes. Thus, by a small margin of 51 votes, the first respondent was declared successful candidate.

According to the appellant, there were several irregularities and illegalties as also discrepancies in the Voters List. Electronic Voting Machines which were employed were defective; many void votes had been polled; there were cases of double voting and all those illegalities vitiated the election and materially affected the result thereof. The appellant, therefore, filed an Election Petition on April 10, 2003. In the said petition, he alleged that one Tek Chand Thakur was the Returning Officer for the constituency in question. At the time of counting, the appellant requested the Returning Officer that he had come to know that many void votes had been cast and they should be deleted from counting, but the Returning Officer expressed his inability and helplessness to do so stating that there was no such mechanism in the Electronic Voting Machines.

In paragraph 8 of the Election Petition, the appellant stated that as many as 188 votes had been wrongly counted though they were invalid/void votes. In the Election Petition itself, the appellant had given details of all such votes. He also stated that since the margin of votes between the defeated candidate and the returned candidate was only 51 votes and the wrong counting of votes amounted to 188 invalid/void votes, it has materially affected the result of the election.

In para 8 (i), he stated that as many as 37 votes of dead persons have been cast and they should not have been counted. The appellant had given names of those dead persons along with numbers in the voters' list. Death certificates of 36 persons were filed as Annexure ER-3 to EP-38. He stated that the Gram Panchayat concerned had not issued death certificate in respect of one Mukesh Kumar. He, therefore, annexed Death Report along with a forwarding letter dated April 7, 2003 in respect of deceased Mukesh Kumar issued by the Senior Medical Officer, Zonal Hospital Una, District, Una. The appellant also stated that out of 37 votes, 30 votes had been polled in booth Nos. 48 and 49, in the native village of the first respondent—returned candidate.

In paragraph 8 (ii), the appellant alleged that as many as 60 double votes had been cast which was in contravention of the provisions of Section 62 (4) of the Representation of the People Act, 1951 (hereinafter referred to as "the Act"). Thus, 120 votes had been counted though voters were only 60. It was in violation of the statutory provision and those votes were, therefore, void. The details of those votes had also been mentioned in the Election Petition itself.

In paragraph 8 (iii), the appellant averred that 19 void votes had been polled. Even though all those persons cast their votes in booth Nos. 76 and 63 of Kullehar—33 Constituency, in Una—32 Constituency, the same voters had again cast their votes. The appellant has given

details of those voters in the Election Petition. According to the appellant, the returned candidate was the beneficiary of those void votes and since the margin was small, the result had been materially affected.

In paragraph 8 (iv), the appellant had alleged that material irregularities had been committed by the Returning Officer while counting Postal Ballot Papers. Six persons named in the petition had sent double Postal Ballot Papers. So instead of six votes, twelve votes had been cast.

According to the appellant, irregularities and illegalities mentioned in paragraph 8 had materially affected the result of the election. Had there been proper voting and counting, the appellant would have secured more number of votes than the first respondent. On the above grounds, a prayer was made by the appellant to call for the record of the Electronic Voting Machines, to inspect all polled votes of 32—Una Assembly Constituency and of booth Nos. 76 and 36 of Kulehar—33 Assembly Constituency, to order re-counting, to set aside and declare election of the first respondent void and to declare appellant as duly elected candidate from 32—Una Constituency. Other reliefs were also prayed for.

A written statement was filed by the respondent controverting facts stated, allegations levelled and averments made in the Election Petition. He denied all the allegations of the appellant. He also raised a preliminary objection as to maintainability of petition contending *Inter alia* that as no objection had been taken by the appellant at an appropriate stage, it was not open to him to raise such contentions after the election was over and result was declared. It was further contended that the petition had not been properly verified as required by law and the appellant had not disclosed the names of persons from whom he had received information as to averments made in sub-paragraphs (i) to (iv) of para 8 of the petition. The first respondent also asserted that the petition lacked material facts and full particulars as required by law. The allegations in the petition were vague and did not disclose sufficient grounds for re-counting for which prayer was made. According to the first respondent, since the petition did not disclose cause of action, it was liable to be dismissed on that ground alone. Apart from that, even on merits nothing could be pointed out which would enable him to claim any of the reliefs sought in the Election Petition and the petition was liable to be dismissed.

In replication, the appellant submitted that the objections raised by the first respondent—returned candidate were ill-founded and reiterated what he had stated in the main petition. According to him, allegations were not vague, but self-explanatory and based on material facts and full particulars.

On the basis of the pleadings, the High Court framed eight issues. The High Court, however treated issues Nos. 5, 6 and 8 as preliminary issues. Since, we are concerned in the instant case only with regard to preliminary issues, they may be re-produced.

5. Whether the election petition does not disclose any cause of action ?
6. Whether the petition lacks in material facts and particulars, as contemplated under Section 83 of the Representation of People Act ?
8. Whether the petitioner is estopped from claiming recounting of votes ?

The High Court then heard the learned counsel for the parties on the above three issues. The High Court noted that it was contended by the learned counsel for the returned candidate that the Election Petition did not disclose cause of action by placing on record material facts which the defeated candidate relied in support of the challenge made by him and the petition was liable to be dismissed. The High Court considered the relevant provisions of the acts as also the leading decisions of this Court and passed the following order:

“For the reasons recorded above, the election petition cannot be said to be in accordance with Section 83 (1) (a) of the Act being benefits of primary facts to complete the

cause of action. The defect cannot be cured even by amendment of the petition.

To conclude, the petitioner has not disclosed all material facts and has withheld the same. In the absence of such facts, a roving inquiry cannot be permitted. There is no dispute that if para 8, sub-paras (i) to (iv) are deleted, nothing survives in the election petition for putting the petition for trial.

For the aforesaid reasons, para 8, sub-paras (i), (ii), (iii) and (iv) are struck down being vague, indefinite and lacking in material particulars. After striking down of the said paras, nothing survives in the election petition. The petition is rejected with costs quantified at Rs. 5000/-". (emphasis supplied).

Regarding 37 votes of dead persons, the High Court observed that according to the appellant, 30 such votes out of 37 votes were cast in booth Nos. 48 and 49 which was in the native place of the first respondent-turned candidate. The Court stated that so far as that allegation was concerned, there was not a word as to how many of those votes were cast in favour of the returned candidate and who cast those votes. The Court proceeded to observe that the defeated candidate did not say that he raised any objection when electoral rolls were prepared or revised under Section 21 of the Representation of the People Act, 1950.

The Court then stated :

"The defeated candidate does not say that he was not aware of the entries of the dead persons in the Electoral Roll which, in my view, is a material fact and ought to have been pleaded".

The High Court also observed that there was not a word, a whisper that the polling agents challenged the identity of the persons who allegedly voted for dead electors. No reason was put forward as to why it was not challenged. In the opinion of the High Court, it was a material fact which ought to have been pleaded to enable elected candidate to meet the challenge. According to the High Court, when the appellant had given particulars of dead persons for whom the voting right was exercised by impersonation, he must have known at the time of polling that those electors were dead. If he was not aware, he ought to have stated as to when and how he came to know about 37 voters whose names appeared in the electoral rolls and how by impersonation votes were polled. There was no allegation that the votes cast due to impersonation of the dead persons were managed by the returned candidate or his supporters or election agent. The said allegation thus lacked material facts. Omission to mention those material facts rendered the cause of action incomplete, observed the High Court. According to the High Court merely because the returned candidate had won by a narrow margin, it could not be a reason for inspection of ballot papers or re-counting of votes.

Regarding 60 persons alleged to have exercised right to vote twice in the same constituency in booth Nos. 48 and 49, thereby resulting in 120 void votes in Una—32 Constituency, the High Court observed that the Election Petition was silent as to when and how the appellant came to know about the persons having cast their votes in different booths in the same constituency. He did not state who impersonated for those persons in the other booth. The appellant also did not say precisely as to when he came to know that 60 persons had voted twice.

As to 19 persons alleged to have voted in two different constituencies, the High Court observed that the allegations were not supported by material facts. Even though the pleading indicated that the defeated candidate was aware of the persons who voted twice at the same constituency and in different constituencies, neither he nor any person on his behalf raised any objection at the relevant time. He also did not disclose the source of information regarding

casting of void votes which was a material fact. Only a bad assertion had been made which was not sufficient.

Regarding double voting in para 8 (iv) while counting postal ballot papers, it was the case of the appellant that instead of six votes, twelve votes were cast because of double Postal ballots. The High Court observed that the appellant had given details of those persons including the vote number, yet it held the allegation on the face of it was "bereft of material facts" and presumptuous. The High Court observed that the allegation would not lead to the conclusion that in fact those six persons cast their votes twice and it materially affected the result of returned candidate. It was also not stated in the petition that those six persons had been issued double postal ballot papers and that all the twelve ballot papers were counted in favour of the returned candidate. According to the High Court, it was a material fact and since it was not stated, the cause of action was not complete.

The High Court, therefore, concluded;

"The allegations made by the defeated candidate are vague, indefinite, bereft of material facts it was not precisely stated as to how many void votes were cast in favour of the returned candidate and if such void votes were not counted in his favour, the defeated candidates would have been elected".

On the basis of the said reasons, the High Court held that the Election Petition could not be said to be in accordance with Section 83 (1) (a) of the Act and the defect could not be cured by amendment of the Petition. Since the appellant had not disclosed all material facts, no reviving could be permitted. The High Court, therefore, ordered striking down sub-paras (i), (ii), (iii) and (iv) of para 8 which resulted in rejection of the Election Petition without entering into merits of the case.

On February 14, 2005, notice was issued by this Court. Interim order was also passed to the effect that Electronic Voting Machines used in two polling booths of 32—Una Assembly Constituency and Booth Nos. 63 and 76 of 33—Kutlehar Assembly Constituency be preserved until further orders. The appeal was thereafter ordered to be placed for final hearing.

We have heard the learned counsel for the parties. The learned counsel for the appellant contended that the High Court has committed an error of law in dismissing the Election Petition at the threshold without entering into merits of the matter on the ground that it did not set out material facts in the Election Petition and failed to disclose cause of action and as such it was liable to be dismissed. According to the learned counsel, not only material facts had been set out in the Election Petition, but full particulars had also been mentioned. The High Court was, therefore, not right in dismissing the petition without entering into the correctness or otherwise of the allegations and averments in the petition. The counsel, therefore, submitted that the appeal deserves to be allowed by setting aside the order of the High Court and by remitting the Election Petition to be decided on merits.

The learned counsel for the respondents, on the other hand, supported the order passed by the High Court. He submitted that the law requires that material facts and full particulars ought to have been stated in the petition. Failure to do so would result in dismissal of the petition and since material facts and full particulars had not been mentioned in the Election Petition, the High Court was right in upholding the preliminary objection of maintainability of petition raised by the returned candidate and in dismissing the petition. He also submitted that the High Court was right in observing that at the relevant stage, no objection was taken either by the defeated candidate or by his election agent and only after the appellant had lost the election that he came forward by raising all technical objections. He, therefore, prayed for dismissal of the appeal by affirming the order of the High Court.

Before we deal with the contentions of the parties, it would be appropriate if we refer to the relevant provisions of the Act. The Preamble of the Act declares that the Act has been enacted "to provide for the conduct of elections of the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections".

Part I is Preliminary. Part II deals with qualifications and disqualifications for membership of Parliament and of State Legislatures. While Part III provides for issuance of notifications for elections, Part IV relates to administrative machinery for the conduct of elections, Sections 59 and 60 lay down manner and procedure of voting. Section 61 prescribes special procedure for preventing personation of electors. Section 62 relates to right to vote. It is a material provision and may be quoted *in extenso*.

- 62. Right to vote.**—(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.
- (2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950).
- (3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.
- (4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.
- (5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.

- (6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorized to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.

Conduct of elections has been dealt with in Part V. Part VI relates to 'Disputes regarding elections'. Section 80 requires any election to be questioned only by way of Election Petition. Under Section 80A, it is the High Court which can try election petitions. Section 81 provides for presentation of election petition and prescribes the period of limitation, Section 82 declares as to who shall be joined as respondents to such Election Petition. Section 83 deals with contents of petition and reads thus—

83. Contents of petition.—(1) An election petition—

- (a) shall contain a concise statement of the material facts on which the petitioner relies;
- (b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

Section 100 enumerates grounds for declaring election to be void which *inter-alia* includes improper reception, refusal or ejection of any vote or the reception of any vote which is void or there is non-compliance with the provisions of the Constitution or of the Act or Rules or Orders made under the Act. Section 101 empowers the High Court to declare a candidate other than the returned candidate to have been elected. Section 123 declares certain practices as "deemed to be corrupt practices".

From the relevant provisions of the Act reproduced hereinabove, it is clear that an election petition must contain a concise statement of 'material facts' on which the petitioner relies. It should also contain 'full particulars' of any corrupt practice that the petitioner alleges including a full statement of names of the parties alleged to have committed such corrupt practice and the date and place of commission of such practice. Such election petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") for the verification of pleadings. It should be accompanied by an affidavit in the prescribed form in support of allegation of such practice and particulars thereof.

All material facts, therefore, in accordance with the provisions of the Act, have to be set out in the election petition. If the material facts are not stated in a petition, it is liable to be dismissed on that ground as the case would be covered by clause (a) of sub-section (1) of Section 83 of the Act read with clause (a) of Rule 11 of Order VII of the Code.

The expression 'material facts' has neither been defined in the Act nor in the Code. According to the dictionary meaning, 'material' means 'fundamental', 'vital', 'basic', 'cardinal', 'central', 'crucial', 'decisive', 'essential', 'pivotal', 'indispensable', 'elementary' or 'primary'. [Burton's Legal Thesaurus (Third edn.) ; p. 349]. The phrase 'material facts', therefore, may be said to be those facts upon which a party relies for his claim or defence. In other words, 'material facts' are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be 'material facts' would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.

In the leading case of *Phillips v. Phillips* (1878) 4 QBD 127: 48 LJQB 135, Cotton, L. J. stated :

"What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants in their guard and tell them what they have to meet when the case comes on for trial".

In *Bruce v. Odhams Press Ltd.* (1936) 1 KB 697 : (1936) 1 All ER 287, Scott, L. J. referring to *Phillips v. Phillips* observed :

"The cardinal provision in Rule 4 is that the statement of claim must state the material facts. The word 'material' means necessary for the purpose of formulating a

complete cause of action; and if any one 'material' statement is omitted, the statement of claim is bad; it is 'demurrable' in the old phraseology, and in the new is liable to be 'struck out' under R. S. C. Order 25 Rule 4 (see *Phillips v. Phillips*) or 'a further and better statement of claim' may be ordered under Rule 7."

A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars', on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. 'Particulars' thus ensure conduct of fair trial and would not take the opposite party by surprise.

All 'material facts' must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.

In *Halsbury's Laws of England*, (4th edn.) vol. 36; para 38, it has been stated :

"The function of particulars is to carry into operation the over-riding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises, and incidentally to reduce costs. This function has been variously stated, namely either to limit the generality of the allegations in the pleadings, or to define the issues which have to be tried and for which discovery is required. Each party is entitled to know the case that is intended to be made against him at the trial, and to have such particulars of his opponent's case as will prevent him from being taken by surprise. Particulars enable the other party to decide what evidence he ought to be prepared with and to prepare for the trial. A party is bound by the facts included in the particulars, and he may not rely on any other facts at the trial without obtaining the leave of the court."

In para 8, the election-petitioner has asserted that as many as 188 votes have been wrongly counted in spite of the fact that all those votes were invalid/void votes. He had also stated that since the margin of votes between the defeated candidate and the successful candidate was only 51, wrong counting of 188 invalid/void votes 'materially affected' the result of the election. The High Court had not dealt with at all paragraph 8 in the impugned judgment. Only on this short ground, in our opinion, the impugned order deserves to be set aside.

But even otherwise, the reasoning adopted and conclusions arrived at by the High Court on sub-para (i) to (iv) of para 8 are equally ill-conceived. In para 8 (i), the election-petitioner has stated that 37 votes of dead persons had been cast and they were thus void votes and could not have been counted. Not only the election-petitioner had given the names of all 37 persons, but had also annexed death certificates of 36 persons along with the Election Petition in the form of Annexures EP 3 to EP 38. Regarding the remaining one, he had stated that the Gram Panchayat had not issued death certificate, but Death Report issued by the Senior Medical Officer, Zonal Hospital Una had been annexed at Annexure EP 39.

The High Court, dealing with the allegation in para 8 (1) has observed that there was nothing to show and not a word as to how many of those 37 votes were cast in favour of the returned candidate and who cast those votes. It was also observed that the defeated candidate never raised any objection at the time of polling and at the stage of filing Election Petition, it was

not open to raise an objection. It was further observed that it was not the case of the election-petitioner that he was not aware of death of those persons at the time of polling and it was a case of personation of electors within the meaning of Section 61 of the Act. There was also not a whisper, observed the High Court that the polling agent had challenged the identity of the persons who allegedly voted for the dead electors. The High Court also stated that it was not stated in the Election Petition that the returned candidate or his supporters or election agent managed to have votes cast by impersonation. All these facts, according to the High Court, were material facts and since they were not stated in the Election Petition, the petition was defective.

We are unable to agree with the High Court. In our opinion, the considerations which weighed with the High Court were in the nature of 'evidence' which is a matter to be considered and proved at the time of trial. The High Court was also not right in virtually invoking the doctrine of estoppel and in dismissing the petition on that ground.

Regarding allegations in para 8 (ii) of the Election Petition, the election-petitioner has alleged that there was double voting by 60 voters which was in violation of section 62 (4) of the Act. The details of those voters have been mentioned in the petition. It was also stated that out of 120 votes (instead of 60) 104 votes were cast at booth Nos. 48 and 49 which were in the native village of the first respondent.

The High Court almost for the same reasons on which it ordered deletion of para 8 (i), has also ordered to delete para 8 (ii). It observed that the petition was significantly silent as to when and how the election-petitioner came to know about the persons having cast their votes twice in two different booths in the same constituency. He also did not say who impersonated those persons in the other booth. Nothing was stated as to when the petitioner precisely came to know about the fact that 60 persons had cast their votes twice in different booths and no reasons was put forward as to whose objection was raised at the relevant time. All these facts, according to the High Court, were material facts since they were not stated, the petition was defective.

With respect, the High Court is not right, when the law prevents a person from exercising right of vote more than once and it is alleged that there was double voting in respect of certain persons, the 'allegation' can be said to be complete. Whether or not the election-petitioner is able to prove the said allegation is a matter of evidence which can be considered only at the stage of trial. By no stretch of imagination, however, it can be said that the material fact, that is, allegation regarding double voting had not been stated in the Election Petition which required Election Petition to be dismissed on that ground.

As to para 8 (iii), the case of the election-petitioner was that 19 void votes had been cast. The said votes being void since 19 persons had exercised their right to vote in two constituencies, i. e. in Una—32 Constituency as also in booth No. 76 and 63 of Kutlehar—33 Constituency. The details of those voters have been mentioned in the Election Petition.

The High Court held that material facts had not been stated and observed that it was not shown as to how the petitioner came to know about the persons listed having votes in two different constituencies and who impersonated them.

As already observed earlier, the approach of the High Court was not in consonance with law and the High Court entered into prohibited area of considering the correctness of the allegation which is to be considered and adjudicated at the time of trial.

Finally, in para 8 (iv), the election-petitioner has alleged that there was material irregularity in postal ballot papers by the Returning Officer. According to the election-petitioner, six persons

whose names have been mentioned in the Election Petition had voted twice thereby 12 votes had been polled. All those 12 votes, therefore, should be treated as void.

The High Court observed that the allegation, on the face of it, was 'bereft of material particulars' and the allegation presumptuous. It observed that nothing was stated as to how and when the defeated candidate came to know about the six persons having been issued double ballot papers. The said fact was material to enable the returned candidate to meet with the allegation of the defeated candidate. It was also not the case of the election-petitioner that all those 12 ballot papers were counted in favour of the returned candidate and that if those votes have been counted in favour of the petitioner, the result could have been materially affected.

On the basis of our conclusions and reasoning in respect of para 8 (i) to (iii), the finding of the High Court on para 8 (iv) also cannot be said to be in consonance with law. Whether or not six persons had been issued voting papers twice and whether or not those votes had polled in favour of returned candidate cannot be said to be a material fact to be stated in the Election Petition. What are required to be stated in the petition are material facts to maintain the petition.

There is distinction between *facta probanda* (the facts required to be proved, i. e. material facts) and *facta probantia* (the facts by means of which they are proved, i. e. particulars or evidence). It is settled law that pleadings must contain only *facta probanda* and not *facta probantia*. The material facts on which the party relies for his claim are called *facta probanda* and they must be stated in the pleadings. But the facts or facts by means of which *facta probanda* (material facts) are proved and which are in the nature of *facta probantia* (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue.

In our considered opinion, material facts which are required to be pleaded in the Election Petition as required by Section 83 (1) of the Act read with Order VII, Rules 11 (a) of the Code have been pleaded by the election-petitioner, cause of action has been disclosed in the Election Petition and, hence, the petition could not have been dismissed by the High Court. The impugned order of the High Court suffers from infirmity and cannot be sustained.

The High Court, in our considered opinion, stepped into prohibited area of considering correctness of allegations and evidence in support of averments by entering into the merits of the case which would be permissible only at the stage of trial of the Election Petition and not at the stage of consideration whether the Election Petition was maintainable and dismissed the petition. The said action, therefore, cannot be upheld and the order deserves to be set aside.

On an additional ground also, the order of the High Court is liable to be set aside. All allegations in Para 8 of the Election Petition, as also sub-para (i) to (iv) of para 8 relate to improper and illegal reception and acceptance of votes and the election-petitioner has challenged the election of the returned candidate on that ground and not on the ground of 'corrupt practice'. He was, therefore, required to state material facts in the Election Petition under Section 83 (1) (a) of the Act. It was, however, not necessary to 'set forth full particulars', which is the requirement of Section 83 (1) (b) of 'any corrupt practice'.

The High Court dismissed the petition *inter alia* on the ground that paras 8 (i) to (iv) lacked in material particulars. Apart from the fact that the law does not require material particulars even in respect of allegations of corrupt practice but only full particulars and if they are lacking, the petition can be permitted to be amended or amplified under Section 86 of the Act, in the instant case, Clause (b) of Section 83 (1) had no application and the petition has been

dismissed by the High Court by applying wrong test. On that ground also, the order passed by the High Court is unsustainable [*vide* Harkirat-Singh V. Amrinder Singh, (2005) 13 S C C 511].

For the foregoing reasons, the appeal deserves to be allowed and is, accordingly, allowed with costs. The order passed by the High Court is set aside. The Election Petition No. 2 of 2003 is restored to file, and is remitted to the High Court to decide the same on merits. Since the election took place in February 2003 and the petition was dismissed on preliminary ground as not maintainable and is required to be decided on merits, the High Court is requested to give priority and dispose it of expeditiously.

Seal.

.....J.
(C. K. THAKKER)

.....J.
(R. V. RAVEENDRAN).

New Delhi :
December 8, 2006.

By order,

Sd/-
(K. AJAYA KUMAR),
Secretary,
Election Commission of India.